NO. 91-1458

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EVA WHEELER - PETITIONER

vs.

BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS, IRVING SVENDSON, RICH GOZARD, DICK RICHARDSON, CECIL O. LOYET, VICTOR LOGAN AND CAROL LOGAN

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

EVA WHEELER, Pro-Se
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QUESTIONS PRESENTED

1. Whether the building permit issued on May 17, 1982 was in error.

2. Whether it was necessary for petitioner to have to resort to a trial with the District Court to have the Mandate of May 7, 1984 enforced, while respondent Logan and an agent for the City of O'Fallon had already concluded, with the issuance of the building permit on May 17, 1982, that the swimming pool was not in compliance with the building code.

3. Whether the Illinois Municipal Code, [Ill Rev. Stat. 1975,ch. 24, par 11-13-15] was illegally omitted on May 7,1984 as to legal fees and costs.

4. Whether the District Court could order petitioner to amend her complaint to re-litigate the Mandate dated May 7, 1984.

5. Whether petitioner's Fourteenth Amendent rights under the Constitution have been violated.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EVA WHEELER,

Petitioner,

vs.

BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, pro-se, respectfully prays that a writ of certiorari issue to review the denial of the Illinois Supreme Court for the Petition for Leave to Appeal, based on a judgement entered by the Fifth District of the Appellate Court of Illinois on May 7, 1984 and dismissed on September 6, 1990, by the Circuit Court.

OPINIONS BELOW

Relevant decisions of the District Court and the Court of Appeals are reported in Case No. 83-L-782 on September 20 and October 1, 1985 and on August 25 and December 21, 1987. Additionally in Case No. 85-CH-179 on June 10, 1985 and March 7, and July 12, 1989, and Case No. 82-MR-167 on December 6, 1989.

JURISDICTION

The Petition for Leave to Appeal was filed instanter in the Illinois Supreme Court on October 10, 1991 and was denied on December 4,,1991. Motion for Leave to file a Motion to Reconsider was denied on January 13, 1992. The jurisdiction of this court is invoked under Title 28, U.S.C.§ 1254 (1).

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVE

The Fourteenth Amendment to the Constitution, Appendix N.

STATEMENT OF THE CASE

This case has been before the Fifth District of the Appellate Court of Illinois and the Illinois Supreme Court for the second time. As more fully discussed in the Statement of Facts, the petitioner had originally sought review of the trial court's ruling finding that the zoning code ordinance of the City of O'Fallon superseded the provisions of the building code ordinance with respect to the location of respondents' Logans' swimming pool. This court reversed the trial court's judgment in part (Eva Wheeler v. City of O'Fallon, et al., Docket No. 5-83-0601 unpublished (Order of May 7, 1984), and found that the building code ordinance applied. It remanded for further proceedings consistent with its order. On

November 8, 1989, respondents Building Grievance Committee requested a Motion to Dismiss. The trial court granted the dismissal on December 6, 1989, and further remanded to the respondent Building Construction Grievance Committee in order that it issue an order in compliance with this Court's Order of May 7, 1984. Respondents Building Construction Grievance Committee did so on March 15, 1990. Thereafter, petitioner sought injunctive relief and the removal of the Logans' swimming pool on the grounds that it violated the building code ordinance of the City of O'Fallon. Respondents Logans filed a Motion to Dismiss alleging that a new ordinance enacted one year after this Court's ruling, superseded the previous building code ordinance. Said Motion to Dismiss was granted. From the granting of respondents' Motion to Dismiss, this petition is taken. Petitioner's Fourteenth Amendment rights have been violated.

STATEMENT OF FACTS

This case involves a dispute between two landowners concerning a swimming pool and whether said swimming pool is situated on respondents' property in such a manner so that it violates the building code ordinance adopted by the City of O'Fallon, Illinois. In May of 1982, the respondents Logans erected an above ground swimming pool on their property. Victor Logan, who is white, was the Assistant Chief of Police of the City of O'Fallon. Petitioner's property is located directly next door to respondent's Logans' property. Before the issuance of a permit and the pool being fully installed, petitioner, who is black, felt that the supporting struts which are part of the pool's wall were too close to her property line and she contacted the City of O'Fallon regarding the ordinances

relating to swimming pools and the requisite setback requirements. Due to the City of O'Fallon's failure to enforce the setback requirements, petitioner instituted separate administrative actions against the Logans alleging that the pool, as constructed, violated the building code setback requirement of six feet. These administrative actions were brought before the Respondents Building Construction Grievance Committee ("Grievance Committee") and the Zoning Board of Appeals ("Board of Appeals") of the City of O'Fallon.

In order to understand how this controversy arose, it is necessary to review the two conflicting ordinances adopted by the City of O'Fallon. On December 17, 1979, the City of O'Fallon amended Section 10.03 of its zoning ordinance to state that swimming pools must be at least three feet from the interior sideline of the builder's lot. (C.64) On January 7, 1980, the City enacted an ordinance

adopting BOCA, published by the Building Officials and Code Administrators International, Inc. (C.46,47) BOCA is a nationally recognized building code. Section 428.4 of that building code provided that "a wall of a swimming pool shall not be located less than six (6) feet from any rear or side property line or ten (10) feet from any street property line, except by specific rules of the jurisdiction in which it may be located." (C.48,49) This section is now found in Section 625.4 of the 1987 BOCA Building Code. The question to be resolved was which of the two setback requirements applied, the six foot requirement as prescribed by BOCA or the three foot requirement as prescribed by the Zoning Code Ordinance.

In separate hearings before the Board of Appeals and the respondent Grievance Committee, petitioner asserted that the swimming pool installed by the respondents was within six feet of her property line, and that the

adequacy of the distance between respondents' pool and her property line should be determined in accordance with the building code and not the zoning ordinance. She further contended that the struts supporting the swimming pool were part of the swimming pool wall. Both Respondent Grievance Committee and the Board of Appeals found against petitioner. The Board of Appeals found that the Three foot setback requirement of the zoning ordinance applied and the Grievance Committee denied petitioner's claim without explanation. Petitioner sought review of both administrative decisions in the Circuit Court of St. Clair County and the cases were consolidated. The cases which were consolidated were known as 82-MR-149 and 82-MR-167, after the consolidation the cases were referred to as 82-MR-167. The circuit issued a judgment in which it found that the Zoning Board's finding that the relevant section of the zoning ordinances "supersedes Section 428.

of the building ordinance is...not against the manifest weight of the evidence." By then, petitioner had obtained another survey which indicated that the underground supporting struts were encroaching onto her property.

Petitioner appealed the Circuit Court's decision to the Appellate Court contending that the trial court erred in concluding that the zoning ordinance superseded the building code insofar as the setback requirement for swimming pools was concerned. On May 7, 1984, the Appellate Court reversed the Circuit Court, stating that since the building code ordinance had been enacted after the zoning code ordinance, that the latest enactment in point of time would be controlling. The Appellate Court then remanded the case back to the Circuit Court of St. Clair County for further proceedings not inconsistent with its decision. (.87-90) Of course, attorneys' fees and costs were not assessed under the Illinois Municipal Code (Ill.Rev.Stat., 1975, ch.24, par.11-13-15)

which states in part:

> "If an owner or tenant files suit hereunder and the court finds that the defendant has engaged in any of the foregoing prohibited activities, then the court shall allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such." [Emphasis added]

City of Chicago v. Westphalen, 418 N.E.2d 63, 49 Ill. Dec. 419,435, 436 (1981) The Court's Mandate issued on November 16, 1984.

However, during the interim, Respondents Logans petitioned for Rehearing, which was denied on June 4, 1984. Also, on July 12, 1984 Respondents petitioned the Supreme Court of the State of Illinois for Petition for Leave to Appeal. Respondents' petition was denied on October 23, 1984. Additionally, on September 4 1984, the City of O'Fallon passed Ordinance No. 1116 which adopted the "CABO" One & Two Family Dwelling Code, published by the Counsel of American Building Officials. This code, like BOCA, is a nationally recognized building code. (C.48,49) Furthermore, on February 18, 1985,

the City of O'Fallon passed Ordinance No. 1138 which adopted the 1984 edition of the BOCA Building Code. (C.125-138) Section 309.5 of the BOCA Building Code indicates that one and two family dwellings may either be constructed in accordance with the CABO or BOCA Code. Accordingly, the BOCA code was not repealled. In passing this ordinance the City of O'Fallon was apparently attempting to circumvent the application of BOCA's six foot setback requirement as to swimming pools. That ordinance states in paragraph 2 Section 101.5 "When the provisions herein specified for health, safety and welfare are more restrictive than other regulations, this code shall apply whenever they may be in conflict."

In 1985,petitioner instituted a suit for injunctive relief regarding the removal of Respondents' Logans' swimming pool. This was Case No. 85-CH-179. Petitioner also had another suit pending in the Circuit Court of St. Clair County which related to trespass and whether the struts

of Respondents' Logans' pool encroached upon her property. This case was No. 83-L-782. Counts II-VI of the six count complaint ended with directed verdicts against petitioner and for respondents. Count I had originally ended in a hung jury and has not been re-litigated. A Petition for Leave to Appeal Count VI, Pro Se,was stricken at the Illinois Supreme Court by the Respondent Weinel, a surveyor, on December 21, 1987. Petitioner was never allowed to testify as to damages and was only awarded $100.00 plus costs, which has not been accepted.

On June 4, 1985, petitioner's Attorney John Johnston obtained leave from the court to file an Amended Complaint in Case No. 85-CH-179. That Amended Complaint was filed on June 11, 1985. On June 10, 1985, Judge Roger Scrivner entered an order disposing of Case No. 85-CH-179, without prejudice. Judge Scrivner reasoned that because the City had adopted the CABO Building Code and because the passage of Ordinance No. 1138 which had the effect of reviving the zoning ordinance

setback requirement, petitioner no longer had a case. It should be noted that the court never held an evidentiary hearing on Case No. 85-CH-179. On July 10, 1985, petitioner filed a Motion to Reconsider the Order of June 10, 1985. In February 1989, Phillip A. Montalvo became attorney of record for petitioner. Mr. Montalvo asked the court to rule on the Motion which had been filed by Mr. Johnston. On March 7, 1989 Judge Scrivner entered an Order to Strike Amended Complaint, stating, inter alia, that the Motion of June 4, 1985 had not been filed. On July 12, 1989, Judge Scrivner entered an Order denying the Motion to Reconsider and stating that petitioner "still had the re-trial of her claim of her monetary damages pending and all other appropriate relief." Judge Scrivner was referring to Case No. 83-L-782.

Still pending, though, was the Appellate Court's ruling in Case No. 82-MR-167, which stated that the City of O'Fallon's Building Code Ordinance relating to a six foot setback

requirement applied to respondents' Logans' swimming pool. On November 3, 1989, a First Amended Complaint was filed with the Circuit Court of St. Clair County in Case No. 82-MR-167. (C.74) Count I requested that the court reverse the decision of the Respondent Grievance Committee and cause respondents Logans to remove their swimming pool since it was in violation of the six foot setback requirement of the BOCA Code. Count II asked that a permanent injunction be entered requiring the respondents Logans to relocate their swimming pool in compliance with the Building Code of the City of O'Fallon which was in effect at the time the pool was constructed by the respondents Logans in 1982, where portions extend on petitioner's property.

On December 6, 1989, the Circuit Court of St. Clair County, Honorable Sheila O'Brien Presiding Judge, entered an Order dismissing Count I of the Amended Complaint, and it further remanded the case to the respondent Grie-

vance Committee to enter an appropriate order consistent with the Appellate Court's May 7, 1984 decision. (C.96) A cover letter dated May 7, 1990, including the Order which states that on March 15, 1990, the Respondent Grievance Committee entered an order wherein the Respondent Grievance Committee determined "that the Building Code in effect on July 22, 1982 is the ordinance that governs the side yard setback line for the construction of swimming pools." (C. 105-109) That order did not cause respondents Logans to relocate their swimming pool.

On May 14, 1990, respondents Logans filed a Motion to Dismiss Count II of petitioner's Complaint in Cause No. 82-MR-167 alleging, inter alia, that "That the Circuit Court... in the case of Eva Wheeler v. Victor Logan and Carol Logan, 85-CH-195, (sic) in its Order of June 10, 1985, held that the City of O'Fallon has adopted new ordinances called the CABO Code which no longer regulates the alleged

swimming pool in question and further that the Zoning Code...clearly regulates the alleged violation that said defendants' swimming pool complies with the zoning setback requirement." (C. 109-110) There has never been an evidentiary hearing conducted by the trial court on the merits of cause No.82-MR-167 since the Appellate Court's ruling on May 7, 1984, even-though, at the request of the Court, petitioner submitted applicable law to support her cause on three different occasions,while respondents Logans submitted applicable law only once.

On September 6, 1990 the trial court, Judge Jan V. Fiss presiding, granted respondents' Logans' Motion to Dismiss stating, inter alia, "The Zoning Ordinances of the City of O'Fallon require that a swimming pool be located not less than three feet from any rear or side property line." (C.160) Said Order granted the petitioner twenty-one days to amend her complaint. From that Order an appeal was taken, which was dismissed by the Appellate

Court for lack of jurisdiction. From that dismissal a Petition for Leave to Appeal to the Illinois Supreme Court was filed but denied. A Petition For Writ of Certiorari is now being brought.

REASONS FOR GRANTING THE WRIT

I

THE TRIAL COURT'S DISMISSAL OF PETITIONER'S AMENDED COMPLAINT, ESPECIALLY COUNT II WITH LEAVE TO AMEND WITHIN TWENTY-ONE (21) DAYS WAS A DE FACTO FINAL AND APPEALABLE ORDER BECAUSE IT BARRED PETITIONER FROM PURSUING HER CHOSEN CAUSE OF ACTION, i.e., FOR VIOLATIONS OF THE BUILDING CODE.

The Petitioner's suit against Respondents Logans under Count II of the Complaint was grounded on alleged violations of the building code, not the zoning code. Cities have the right to amend their zoning ordinances and grant variances. Citizens Bank & Trust Company of Park Ridge v. City of Park Ridge, 282 N.E. 2d 751, 5 Ill.App.3rd 77 (1972). The

test in determining the validity of such variances is broad and, for the most part, subjective. Garner v. City of Carmi, 28 Ill.2d 560, 192 N.E.2d 816 (1963). As the facts in this case already indicate, the City of O'Fallon and the respondents have used zoning ordinances to circumvent the court's previous rulings. They realize that variances to existing zoning ordinances are easier to obtain than are variances to building code ordinances. If the petitioner is forced to proceed under the theory of law that the respondents are subject to the restrictions of the newly enacted zoning ordinance, then the petitioner will be arguing a totally different theory of law. Accordingly, all issues, regarding violations of the building code have been litigated.

It is submitted that a building code is one that provides standards for the construction of buildings and structures and is directly related to the protection of the health and safety of the city inhabitants. Zoning

Ordinance Section 204 (e) only indirectly applies to swimming pools. This indirect application is made by reading the definition of "detached accessory structures" to include swimming pools. A zoning ordinance governs where and how land may be used and developed. Illinois Law & Practice, Vol.10, Sec. 1133. The purpose of zoning is to protect the public health, safety and welfare and its lawful exercise. Village of Glenview v. Van Dyke, (1968) 93 Ill.App.2d 118, 240 N.E. 2d 354, 356 Zoning divides a jurisdiction into a number of zones or land use districts. Susan M. Connor, ICLE MUNICIPAL LAW 10-1 - 10-5 (1987). A zoning code states what types of activities land may be used for i.e. commercial or residential whereas a building code is concerned with not where a structure is built but how a structure is built. The trial court's order of dismissal prevents the petitioner from asserting that violations of the building code occurred and

and that relief should be granted. Therefore, the litigation has come to an end because the order "disposes of [the parties] rights as to the issues made by the suit." Gray v. Starkey, 41 Ill.App.3d 555, 353 N.E.2d 703, 706 (1976). That Order is a final Order which is appealable.

II

THE APPELLATE COURT HAD PREVIOUSLY RULED THAT THE BUILDING CODE APPLIED TO THE CASE AND NOT THE ZONING CODE AND THUS THE DOCTRINE OF RES JUDICATA RENDERS THE RESPONDENT'S CLAIM, THAT THE ZONING CODE SHOULD APPLY, VOID. AS SUCH, THE TRIAL COURT COULD NOT DIRECT THE PETITIONER TO SEEK RELIEF UNDER THE ZONING CODE.

The doctrine of res judicata provides that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." [Emphasis Added] Housing Authority for LaSalle County v. Young Men's Christian Association of Ottawa,

101 Ill.2d 246, 249, 78 Ill. Dec. 125, 128, 461 N.E.2d 959, 962 (1984). When res judicata is established it acts "as a bar against the prosecution of second action between the same parties upon the same claim or demand... it is conclusive not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other matter which might have been offered for that purpose." Id.

On May 14, 1990, Respondents Logans filed their Motion to Dismiss. (C. 109-110) On September 6, 1990, the Trial Court granted respondents' Motion and the appeal ensued. "If the same evidence would sustain both the first and second action, there is an identity of the causes of action and res judicata applies." Page v. Illinois Central Gulf Railroad, 162 Ill.App.3d 744, 746, 516 N.E.2d 431, 433 (5th Dist. 1987).

Under the facts of this case, it is clear that a final judgment was rendered by the

Appellate Court on the merits of this case on May 7, 1984, and that its finding that the BOCA Building Code applies and hence that the six foot setback requirement for swimming pools applies, is conclusive as to the rights of the parties. Said ruling would constitute an absolute bar to the respondents' contention that the City of O'Fallon adoption of Ordinances Nos. 1116 and 1138 makes the zoning laws applicable. To allow the respondents to maintain this argument would be to allow them to re-litigate the claim that the zoning code applies over the BOCA Building Code. The Appellate Court has already established by its May 7, 1984 decision that it is the BOCA Building Code in effect on July 22, 1982 that is applicable to the case between petitioner and the respondents Logans. The judgment of the Appellate Court is final and it addressed the merits of the case and, therefore, the doctrine of res judicata is applicable.

THE TRIAL COURT IMPROPERLY DIRECTED THE PETITIONER TO AMEND HER COMPLAINT TO ALLEGE A VIOLATION OF THE ZONING CODE WHICH WAS ENACTED SUBSEQUENT TO THE APPELLATE COURT'S ORIGINAL RULING IN ORDER TO DEFEAT THE EFFECT OF SAID RULING IN CONTRAVERTION OF THE ESTABLISHED PRINCIPLE THAT THE RIGHT OF A LEGISLATIVE BODY TO AMEND OR REPEAL LEGISLATION IS LIMITED BY PROHIBITION AGAINST AFFECTING A VESTED RIGHT.

It is the contention of the respondents that because the City of O'Fallon, in February 1985, adopted Ordinance No. 1138, which adopted the 1984 version of the BOCA Building Code, that the three foot setback requirement applies. They reason that under Section 101.5. 1 (c), of that ordinance, certain zoning ordinance provisions were exempted, including those which would apply to swimming pools. Section 101.5.1 (c) states "the provisions of this code shall not be construed to repeal, modify or constitute an alternative to the provisions of the zoning ordinances as they relate to the permitted classes of principal buildings, to use and occupancy of buildings and structures, and/or to the area and bulk regulation

of buildings and structures." The respondents contention is incorrect, because petitioner's rights vested when the Appellate Court handed down its decision on May 7, 1984.

It is generally accepted that a legislative body has a continuing right to amend a statue or ordinance, even while litigation is pending involving legislation. The court must decide the case in accordance with the law in effect at the time of decision. Sagitarius, Inc. v. Village of Arlington Heights, 90 Ill. 3d 401, 404, 413 N.E.2d 90, 93 (First District, First Division 1980). This rule is equally applicable to cities and villages and the enactment of ordinances. Id.. Additionally, it is generally accepted that the repeal of an ordinance stays all proceedings from it which are pending at the time of repeal, unless expressly repealed by a savings clause in the repealing ordinance. County of DePage v. Molitor, 26 Ill.App.2d 232, 167 N.E.2d 592 (1960).

However, there is a limitation which prohibits the right of a legislative body to amend or repeal legislation when such amendment or repeal will affect vested rights. Sagitarius, Inc. v. Village of Arlington Heights, 90 Ill. App.3d 401, 404, 413 N.E.2d 90, 93 (First District, First Division 1980). The repeal of an ordinance cannot modify a judgment already entered or divest rights already vested under the repealed ordinance. People ex rel. McCornack v. McWethy, 165 Ill. 222, 46 N.E. 187 (1896); Gibbons v. Aurora, Elgin and Chicago R.R., 263 Ill. 266, 104 N.E.2d 1063 (1914). In McCornack the Supreme Court of Illinois reviewed a case involving an ordinance passed by the City of West Aurora, on July 7, 1890, which allowed for a special assessment to finance the construction of a sewer system. The passage of this ordinance was disputed by certain property owners and judgment of the Court was affirmed on January 18, 1892 on behalf of the property owners. (Walker v. City of Aurora, 140

Ill 402) (1892). After the Court rendered its judgment but before its affirmance by the Appellate Court, the city council on July 28, 1891, passed another ordinance for the construction of the sewer system in the same district and concerning the same streets embraced in the first ordinance. In July of 1892, the City Council, in an effort to circumvent the Court's ruling in Walker repealed the second ordinance and proceeded to contract for the construction of the sewers under the first ordinance. The Illinois Supreme Court held that the judgment rendered in the Walker case "concerning the assessment under the first ordinance was a final judgment, and remained in full force and effect notwithstanding the passage of the ordinance in July of 1892, and that the court which rendered it could not set it aside or deny its binding force at a subsequent term, but the court as well as the city and all parties to it was bound by it." Id. (emphasis added)

In the case at bar, the Appellate Court entered its final judgment on May 7, 1984, finding that the ordinance that was applicable at the time of its ruling, was the BOCA Build-

ing Code Ordinance in effect on July 22, 1982, which provided for a six foot setback for swimming pools. In accordance with the McCornack decision, petitioner's rights vested on May 7, 1984. The fact that the City of O'Fallon subsequently adopted Ordinance No. 1116 on September 4, 1984 and No. 1138 in February of 1985, adopting the CABO and BOCA Codes with exemptions as to the continued effect of the zoning ordinances, has no bearing on the rights of petitioner as determined by the Appellate Court. Therefore, at the time the decision was reached by the Appellate Court, petitioner's right in having the six foot setback requirement of the BOCA Building Code enforced against the respondents Logans had vested and no subsequent ordinance can affect that right. In Village of Park Forest v. Wojceichowski, 29 Ill.2d 435, 194 N.E.2d 346 (1963), the court held that the new portions of an ordinance changed by an amendatory ordinance take effect prospectively. The respondents' Logans' pool was constructed

in May of 1982. In order for Ordinances No. 1116 and 1138 to be applicable, the respondents Logans would have had to have constructed their pool after the effective date of those ordinances.

In this case, it is apparent from the actions of the City of O'Fallon, in passing Ordinances No. 1116 and 1138 that they were trying to circumvent the ruling of the Appellate Court. It seems that the City of O'Fallon had succumbed to the political influence asserted by the then Assistant Chief of Police Logan when they enacted these ordinances. These setback requirements were not enacted for the benefit, safety and health of neighboring property owners, but for the benefit of Respondents Logans.

Further, it should be noted by this Court that when the City of O'Fallon finally complied with the decision of the Appellate Court on March 15, 1990, that the order entered by the respondent Grievance Committee states:

"the Building Code in effect on July 22, 1982 is the ordinance that governs the side yard setback line for the construction of swimming pools." (C. 120)

This puts the respondents' argument in a different light because by entry of this order, the City of O'Fallon is stating that any pools constructed within the City of O'Fallon, will be regulated by the building code ordinance in effect on July 22, 1982.

In a deposition taken June 12, 1984, respondent Chief Logan acknowledged that their pool was within six feet of petitioner's property line. It was also established during the hearing before the Zoning Board of Appeals that the date of installation of the pool was May 6, 1982, although the permit was dated May 17, 1982. From that, one can logically conclude that the installation of the pool was done without a permit. A prima facie survey conducted and certified by surveyor Frank Morski on July 11, 1983, graphically indicates that respondents'

Logans' swimming pool has never been in compliance with neither the building code nor the zoning code: The permit was not only inconclusive because the support struts were not included in the drawings, but incorrect because respondents Logans apparently had not had their property surveyed. For those reasons one would conclude that the permit was issued in error. In City of Chicago v. Westphalen, 418 N.E.2d 63, 49 Ill. Dec. 419, 425 (1981) it states that:

> "...the court held that the permit was illegally issued because the ministerial officer exceeded the authority conferred upon him. The court stated a building permit should not have been granted in violation of the terms of the zoning ordinance and concluded that the unauthorized permit was a nullity and conferred no rights upon the permittee."

CONCLUSION

For the foregoing reasons, this Petition should be granted, in hopes that Petitioner's Mandate of 1984 be enforced and that she be awarded legal fees as well as actual and punitive damages, as prescribed by law.

Respectfully submitted,

Eva Wheeler, Pro-se

EVA WHEELER, PRO SE

APPENDIX A-FIRST FINAL JUDGMENT FILED MAY 7, 1984

No. 5-83-0601

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EVA WHEELER,	)	
	)	Appeal from the
Plaintiff/Appellant,	)	Circuit Court of
	)	St. Clair County.
vs.	)	
	)	
CITY OF O'FALLON,ET AL,	)	
	)	
Defendants/Appellees,	)	
	)	
EVA WHEELER,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	
BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ET AL,	)	
	)	Honorable Stephen
	)	Kernan, Judge Pre-
Defendants/Appellees.	)	siding.

HARRISON, J.

O R D E R

Eva Wheeler, plaintiff, appeals from a

Appendix A

judgment of the circuit court of St. Clair County affirming the decisions of the building grievance committee and the zoning board of appeals of the City of O'Fallon (city) in regard to the placement of a swimming pool on the lot of plaintiff's neighbor. For the reasons which follow, we affirm in part, reverse in part, and remand.

On December 17, 1979, the City of O'Fallon updated its zoning ordinance. This ordinance contains a chart which indicates that an "accessory building or structure", if detached and located in a "single-family residence dwelling district", must be at least three feet from the interior sideline of the builder's lot. That section of the ordinance defining "structure" specifically indicates that structures include swimming pools. Section 10.03 of the Zoning Ordinance provides that "this Ordinance shall supersede such other Ordinances or parts of other Ordinances of the City in

conflict with the provisions of this Ordinance."

On January 7, 1980, the city enacted an ordinance adopting a general building code. Section 428.4 of that building code provides that "[a] wall of a swimming pool shall not be located less than six (6) feet from any rear or side property line or ten (10) feet from any street property line, except by specific rules of the jurisdiction in which it may be located." The ordinance adopting the building code also provides that "[a]ll ordinances or parts thereof that conflict with the provisions of this ordinance are to the extent of such conflict repealed."

In separate hearings before the zoning board of appeals and building grievance committees of the city, plaintiff asserted that a swimming pool installed by her neighbor, Victor Logan, was too close to her property line, and that the adequacy of the distance

between Logan's pool and plaintiff's property line should be determined with reference to the building code and not the zoning ordinance. Both bodies ruled against plaintiff, the zoning board finding that the three foot setback requirement of the zoning ordinance applied and the building grievance committee denying plaintiff's claim without expressing reasons. Plaintiff subsequently sought review of both decisions in the circuit court of St. Clair County, and the cases were consolidated. Following a hearing, the court issued a judgment in which it found that the committee's finding that the relevant section of the zoning ordinance "supersedes §428.4 of the building ordinance is * * * not against the manifest weight of the evidence."

On appeal, plaintiff argues that the trial court erred in concluding that the zoning ordinance superseded the building ordinance insofar as the setback requirement for

swimming pools is concerned. We agree. The record establishes that the building ordinance did not come into effect until after the zoning ordinance had been updated. Where there is an irreconcilable conflict between statues or ordinances the latest enactment in point of time will usually control, (See Esin v. Liberty Mutual Insurance Co. (1981), 99 Ill. App.3d 75,80, 424 N.E.2d 1307; 34 Ill.L. § Prac. Statues §131 (1958).) This rule of construction is appropriately applied here, where the zoning ordinance unequivocally indicates that swimming pools must be at least three feet from the pool owner's side lot line and the building ordinance states with equal force that the minimum distance between pool and side lot lines must be six feet. Accordingly, the court erred in concluding that the relevant provisions of the zoning ordinance superseded those of the

building ordinance, and the portion of the judgment so holding must be reversed.

Plaintiff also attacks the findings of the building grievance committee concerning a fence erected by plaintiff along the boundary line between her property and that of Logan. Section 428.8.2 of the building code provides that persons erecting swimming pools on their land must also "erect and maintain thereon an adequate enclosure either surrounding the property or pool area, sufficient to make such body of water inaccessible to small children." While plaintiff argues that Logan must, pursuant to this language, build his own fence along the property line in question, the building code also provides that a "natural barrier, hedge, pool cover or other protective device approved by the governing body may be used so long as the degree of protection afforded by the substituted devices or structures

is not less" than that offered by the normally required enclosure. Here, the committee could properly have concluded that plaintiff's fence was the type of "other protective device" sufficient to enclose Logan's pool, and we cannot say that either the committee or the trial court erred in not requiring Logan to construct his own fence alongside plaintiff's. While plaintiff asserts that her fence was not sufficient to make Logan's pool inaccessible to small children, we cannot say that the committee's finding to the contrary was against the manifest weight of the evidence.

For the foregoing reasons, that portion of the judgment of the circuit court of St. Clair County affirming the committee's finding regarding the adequacy of the fence is affirmed. The remainder of the judgment is reversed, and this cause is remanded for further proceedings not incon-

sistent herewith.

Affirmed in part, reversed in part and remanded.

WELCH, P.J.., and KASSERMAN, J., concur.

Dated: May 7, 1984

APPENDIX B-CIRCUIT COURT'S ORDER FILED NOVEMBER 3, 1989

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

EVA WHEELER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 82-MR-167
	)	
BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS et al.	)	
	)	
Defendants.	)	

O R D E R

This cause coming on for hearing on Plaintiff's Motion to Amend Complaint; the Court being fully advised in the premises, FINDS AND ORDERS that the same be, and is hereby GRANTED.

ENTER: 11-3-89

s/Sheila O'Brien
J U D G E

Dated: November 3, 1989

APPENDIX C-ORDER TO DISMISS AND FURTHER ORDER FILED DECEMBER 1989

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

EVA WHEELER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS, RON STEIN, BILL HARPER, IRVIN SVENDSON, RICH GORAZD, DICK RICHARDSON, CECIL O. LOYET, VICTOR LOGAN AND CAROL LOGAN	)	NO. 82-MR-167
	)	
Defendants.	)	

O R D E R

Defendant, Building Grievance Committee of the City of O'Fallon, Motion to Dismiss First Amended Complaint presented for argument November 28, 1989. The Court having heard the arguments of counsel and being fully advised in the premises, finds: The Building Grievance Committee of the City of O'Fallon, Illinois at a hearing before that Committee, at the request of

the Plaintiff, found that the Zoning Ordinance of the City of O'Fallon applied as to the setback. That Order was appealed to the Circuit Court, Circuit Court affirmed same. Circuit's Order was then appealed to the Appellate Court for the Fifth District, State of Illinois, on May 7, 1984 the Appellate Court entered an Order affirming the Committee's finding regarding the adequacy of the fence, the remainder of the Judgment was reversed finding that the Building Code 6 foot setback line for swimming pools applied and not the Zoning Ordinance setback line.

The Appellate Court in its opinion then remanded this matter back to the Circuit Court for further proceedings not inconsistent with its opinion. The Court finds that Defendant's Motion to Dismiss Count I of the First Amended Complaint is well founded and that same should be

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granted. The Court further finds that the Plaintiff's request that the Court enter an appropriate Order remanding this case to the Building Grievance Committee of the City of O'Fallon, Illinois to enter an appropriate Order consistent with the Appellate Court's decision filed on May 7, 1984.

IT IS THEREFORE ORDERED that Count I of the First Amended Complaint in the above cause of action be and the same is hereby dismissed.

IT IS FURTHER ORDERED that this matter be remanded to the Building Grievance Committee of the City of O'Fallon, Illinois for them to enter an appropriate Order in compliance with Appellate Court's decision in this matter which was entered on May 7, 1984.

s/Sheila O'Brien
CIRCUIT JUDGE
Dec.6,1989

Dated: December 6, 1989

APPENDIX D-CITY OF O'FALLON'S COUNSEL'S COVER LETTER AND ORDER DATED MAY 7,1990, ENTERED MARCH 15, 1990

DELMAR O. KOEBEL
ATTORNEY AT LAW
109 WEST ST. LOUIS STREET
POST OFFICE, BOX 70
LEBANON, ILLINOIS
62254

618-537-4468

May 7, 1990

Mr. Phillip Montalvo
Attorney at Law
2 Park Place
Professional Centre
Belleville, Il 62223

Re: City of O'Fallon - Wheeler
No. 82-MR-167

Dear Phil:

Enclosed herewith is a photocopy of an Order entered by the Building Construction Grievance Committee of the City of O'Fallon in compliance with the Circuit Court's Order as well as the Fifth District Court of Appeals. This was entered March 15, 1990.

Yours very truly,

Delmar O. Koebel
s/Delmar O. Koebel

DOK:pl
Enclosure
CC: Circuit Clerk

Appendix D

BEFORE THE
BUILDING CONSTRUCTION GRIEVANCE COMMITTEE
CITY OF O'FALLON, ILLINOIS

IN THE MATTER OF THE APPEAL
OF EVA WHEELER

O R D E R

The Building Construction Grievance Committee on July 22, 1982, entered an Order finding that the appeal of Eva Wheeler from the interpretation by the compliance officer would be dismissed. By virtue of that Order the Board found that the Zoning Ordinance as of July 14, 1982 was the Ordinance that governe the side yard setback line for the construction of an above ground swimming pool. The Committee further finds that subsequent thereto the ruling was appealed to the Circuit Court of St. Clair County and from there to the Fifth District Appellate Court for the State of Illinois. The Committee further finds that the Appellate Court revers-

Appendix D

ed the determination of this Committee and remanded the cause to the Circuit Court of St. Clair County. The Committee further finds that the Circuit Court of St. Clair County entered an Order remanding the matter to this Committee to enter a new Order in compliance with the opinion of the Appellate Court of the Fifth District of the State of Illinois. The finding of the Appellate Court of the Fifth District of Illinois found that the Building Code in effect on July 22, 1982 was the ordinance that governed the setback line not the Zoning Ordinance.

IT IS THEREFORE ORDERED by the Committee that the appeal of Eva Wheeler from the interpretation of the Code Enforcing Officer is hereby granted and the Committee determines that the Building Code in effect on July 22, 1982 is the Ordinance that governs the side yard setback line for

the construction of a swimming pool.

s/Irvin Svendson
CHAIRMAN

Dated: May 7, 1990
Entered: March 15, 1990

Per Counsel
Delmar Koebel
via telephone
call 2-20-92

APPENDIX E-ORDER TO DISMISS AND FURTHER ORDER TO AMEND COMPLAINT DATED SEPTEMBER 5, 1990, FILED SEPTEMBER 6, 1990

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

EVA WHEELER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 82-MR-167
	)	
BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS, ET AL.;	)	
	)	
Defendants.	)	

O R D E R

Motion to Dismiss called for having arguments heard and memorandum having been cited:

IT IS ORDERED that said Motion to Dismiss is hereby granted because the Zoning Ordinance of the City of O'Fallon is controlling in this case for the following reasons:

1) The City of O'Fallon passed Ordinance No. 1116 on September 4, 1984, which Ordinance adopted the CABO 1 & 2 Family Dwelling Code. Said CABO 1 & 2 Family Dwelling

Appendix E

Code makes no reference as to swimming pools.

2) The property involved in this lawsuit is a single family resident.

3) That the City of O'Fallon adopted Ordinance No. 1138 on February 18, 1985 by which they adopted the 1984 BOCA Building Code set up by Ordinance No. 1138 subsection 101.5.1 Exemptions: (c) Zoning provides:

> "the provisions of this code shall not be construed to repeal, modify or constitute an alternative to the provisions of the zoning ordinance as they relate to permitted classes of principal buildings to use and occupancy of buildings and structure and/or to the area and bulk regulations of buildings and structures."

4) The Zoning Ordinances of the City of O'Fallon require that a swimming pool be located not less than three feet from any rear or side property line.

Appendix E

IT IS FURTHER ORDERED that Plaintiff is given twenty-one (21) days to amend her Complaint.

s/Jan V. Fiss
JUDGE

DATED: September 5, 1990

APPENDIX F-ORDER TO SHOW CAUSE FILED JUNE 14, 1991

No. 5-90-0619

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EVA WHEELER, Plaintiff-Appellant, v. BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS, ET AL., Defendants-Appellees.	) Appeal from the Circuit Court of St. Clair County.)) No.82-MR-167

O R D E R

This cause has been considered on the court's own motion, and the court being fully advised FINDS:

That plaintiff, Eva Wheeler, filed her one-count complaint against the defendants, the Building Grievance Committee of the City of O'Fallon and its members (Committee) and plaintiff's neighbor, Victor Logan

Appendix F

(Logan), in the circuit court of St. Clair County on August 20, 1982. The complaint requested that the court reverse the decision of the Committee and (1) order the defendants to remove the neighbor's swimming pool, (2) order Logan to provide a safety enclosure, and (3) order the Committee to file a complete transcript of its hearing on the matter;

That on August 24, 1983, the circuit court affirmed the decision of the Committee because it was not against the manifest weight of the evidence. Plaintiff filed a notice of appeal on August 29,1983;

That on May 7, 1984, this court affirmed the decision of the circuit court and the Committee insofar as they ruled that the neighbor's fence was adequate as a safety enclosure, but otherwise reversed and remanded, holding that the village's building ordinance superseded the zoning ordinance.

Appendix F

(Wheeler v. Building Grievance Committee (1984), 123 Ill. App. 3d 1161, 479 N.E.2d 1247 (unpublished Rule 23 order).) The decision remanded the cause for further proceedings consistent with the opinion. This court's mandate issued on November 16, 1984;

That on October 31, 1989, plaintiff filed a motion to amend her complaint, which was granted. On November 3, plaintiff filed her two-count complaint. Count I was directed against the Committee and requested that the Committee reverse its decision and require the removal of the pool as a violation of the building ordinance. Count II was directed against the Logans and requested a permanent injunction requiring them to move their pool;

That on November 9, 1989, the Committee filed a motion to dismiss count I, which was granted by the circuit court on Decem-

ber 6, 1989. The circuit court's order dismissed count I and remanded the cause to the Committee "to enter an appropriate Order in compliance with the appellate court's decision in this matter which was entered on May 7, 1984." The record on appeal includes a copy of an order entered by the Committee which grants the "appeal" of plaintiff and determines that the building code governed the side yard setback line for the swimming pool. A cover letter indicates that the order was entered on March 15, 1990;

That on May 14, 1990, the Logans filed a motion to dismiss Count II of the amended complaint. That motion was granted by an order of the circuit court on September 6, 1990. However, the order granted plaintiff 21 days to amend her complaint;

That on September 25, 1990, plaintiff filed her notice of appeal from the order

entered on September 6;

That it appears that this court is without appellate jurisdiction where at least count II of the amended complaint remains pending because plaintiff was given leave to amend;

That with respect to count I, it appears that the circuit court's order of December 6, 1989, was a final order dismissing count I, despite the fact that the court remanded to the Committee. The court remanded with specific instructions to enter an order in compliance with this court's disposition. Thus, it appears the order dismissing count I was a final order. It was not appealable at that time in the absence of a finding pursuant to Supreme Court Rule 304(a) (134 Ill. 2d R. 304(a));

That with respect to count II, however, it appears that the circuit court's order dismissing that count was not a final order

because it granted plaintiff leave to amend. Thus, that order was also not appealable;

That a final judgment is one in which the cause of action is dismissed with prejudice with no leave to refile. (Martin v Marks (1980), 80 Ill. App. 3d 915, 918, 400 N.E.2d 711, 713; O'Fallon Development Co. v. City of O'Fallon (1976), 43 Ill. App. 3d 348,351, 356 N.E.2d 1293, 1297.) A dismissal of a complaint or a count thereof with leave to refile is not a final order for purposes of appeal, even if an amended complaint is not filed within the time prescribed by the order. Gray v. Starkey (1976), 41 Ill. App. 3d 555,558, 353 N.E.2d 703, 706; and

That because the circuit court did not dismiss count II with prejudice and instead allowed plaintiffs leave to amend, count II was not finally disposed of. Therefore, plaintiff's notice of appeal was premature and did not vest this court with appellate

jurisdiction.

IT IS THEREFORE ORDERED that plaintiff-appellant is granted 10 days from the date of this order within which to show cause why this appeal should not be dismissed for lack of jurisdiction.

Dated: June 14, 1991

APPENDIX G-ORDER DISMISSING APPELLANT'S APPEAL, FILED AUGUST 15, 1991

No. 5-90-0619

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EVA WHEELER, Plaintiff-Appellant v. BUILDING GRIEVANCE COMMITTEE OF THE CITY OF O'FALLON, ILLINOIS, et al., Defendants-Appellees.	)Appeal from the)Circuit Court of)St.Clair County.))No. 82-MR-167

O R D E R

This cause has been considered on this court's June 14, 1991, show-cause order; and on plaintiff-appellant's response thereto; and the court being fully advised:

IT IS THEREFORE ORDERED that this appeal shall be, and the same hereby is, DISMISSED for lack of jurisdiction, for the reasons set forth in this court's June 14, 1991, show-cause order.

Dated: August 15, 1991

APPENDIX H-ORDER ALLOWING MOTION INSTANTER DATED OCTOBER 17, 1991

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

October 17, 1991

JULEANN HORNYAK
Clerk of the Court
(217)782-2035

FIRST DISTRICT
OFFICE
ROOM 30-129
Richard J.Daley
Center
Chicago 60602
(312)793-1332

Mr. Phillip A Montalvo
Wimmer, Stiehl & Montalvo, P.C.
2 Park Place Professional Centre
P.O. Box 1288
Belleville, IL 62223

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 72654-Eva Wheeler, petitioner, v. Building Grievance Committee of the City of O'Fallon, etc., et al., respondents.

The motion by petitioner for leave to file petition for leave to appeal instanter is allowed.

JH:bko

cc: Robert J. Sprague
Dated: October 17, 1991

APPENDIX I-THE SUPREME COURT OF ILLINOIS DENIED PETITION FOR LEAVE TO APPEAL DATED DECEMBER 4, 1991

72654

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
December 4, 1991

Mr. Phillip A. Montalvo
Wimmer, Stiehl & Montalvo
2 Park Place Professional Centre
Belleville, IL 62223

No. 72654-Eva Wheeler, petitioner, v. Building Grievance Committee of the City of O'Fallon, etc., et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1991.

Dated: December 4, 1991

APPENDIX J-ORDER DENIED LEAVE TO FILE MOTION TO RECONSIDER DATED JANUARY 13,1992

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

January 13, 1992

JULEANN HORNYAK
Clerk of the Court
(217)782-2035

FIRST DISTRICT OFFICE
ROOM 30-129
Richard J.Daley Center
Chicago 60602
(312)793-1332

Ms. Eva Wheeler
1408 Princeton Drive
O'Fallon, IL 62269

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 72654-Eva Wheeler, petitioner, v. Building Grievance Committee of the City of O'Fallon, etc., et al., respondents.

The motion by petitioner, pro se, for leave to file a motion for reconsideration of the order denying petition for leave to appeal is denied.

JH/hc

cc: Mr. Robert Sprague
Mr. Delmar Koebel

Dated: January 13, 1992

APPENDIX K-ORDER GRANTING LEAVE TO FILE AMENDED PLEADINGS FILED JUNE 4, 1985

STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT,
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

PLAINTIFF _ Wheeler)
) No. 85-CH-179
vs.)
)
Logan)
)
Defendant)

O R D E R

This cause coming before the Court: the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds:.....

IT IS THEREFORE ORDERED:

Upon motion of both court to rule on motion to dismiss by June 7, 1985. Plaintiff granted leave to file amended pleadings.

Attorneys: Enter:

.....John.Johnston.

.....Bob.Sprague... s/ Roger.Scrivner...
Judge

Dated: June 4, 1985

APPENDIX L-ORDER STRIKING AMENDED COMPLAINT AND MOTION TO RECONSIDER SET FOR ARGUMENT FILED MARCH 7, 1989

STATE OF ILLINOIS
IN THE TWENTIETH JUDICIAL CIRCUIT,
ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

PLAINTIFF-Wheeler)
)
vs.) No.85-CH-179
)
Logan)
)
Defendant.)

O R D E R

This cause coming before the Court; the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds:.Upon.review.of.the.file...

IT IS THEREFORE ORDERED:

(1) This Court entered an order on June 10th, 1985 disposing of the matter.

(2) On June 11th, 1985, without leave of court, the plaintiff filed a purported amended complaint, by, then, attorney John Johnston.

(3) On July 10th, plaintiff filed a motion to reconsider the **ORDER** June 10th, 1985, but the court was never notified

Appendix L

or requested to rule on the motion up to and including Feb 6th, 1989.

Therefore, the Court finds as follows-

(A) Since the Court has been out of the "CH" DIVISION for 4 years, (B) Since plaintiff has not actively pursued the matter for 4 years (C) Since no leave of court was ever granted to plaintiff to file an amended complaint, the Court rules as follows

(A) Amended complaint striken

(B) Motion to re-consider, if the court still has jurisdiction, is set for argument on March 20, 1989 at 9:00 AM.

Attorneys: Enter Copies to parties:

.....
Plaintiff

.....
Defendant

s/Roger M. Scrivner
Judge

Dated: March 7, 1989

APPENDIX M-MOTION TO RECONSIDER DENIED FILED JULY 12, 1989

STATE OF ILLINOIS

IN THE TWENTIETH JUDICIAL CIRCUIT,

ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

PLAINTIFF - Wheeler,)
)
vs.)No. 85-CH-179
)
Logan)
)
Defendant.)
)

O R D E R

This cause coming before the Court; the Court being fully advised in the permises and having jurisdiction of the subject matter;

The Court finds:.....

IT IS THEREFORE ORDERED:

Pursuant to the Court's Order of March 7, 1989, and incorporating all of said order, said Motion to Reconsider is denied. Said plaintiff still has pending a re-trial of her claim for monetary damages and all other appropriate relief. Piece-meal litigation, as requested here is not favored.

Appendix M

Copies to parties

Attorneys: Enter: July 12, 1989

.....
Plaintiff

..... s/Roger M. Scrivner..
Defendant Judge

Dated: July 12, 1989

APPENDIX N-AMENDMENT XIV TO UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

(2)

No. 91-1458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EVA WHEELER,
Petitioner,

VS.

BUILDING GRIEVANCE COMMITTEE
OF THE CITY OF O'FALLON, ILLINOIS,
IRVING SVENDSON, RICH GOZARD, DICK RICHARDSON,
CECIL O. LOYET, VICTOR LOGAN and CAROL LOGAN,
Respondents.

BRIEF IN OPPOSITION

ROBERT J. SPRAGUE
15 South High Street
Belleville, IL 62220
(618) 233-5190

Attorney for the Respondents,
Victor Logan and Carol Logan

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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Sagittarius v. Village of Arlington Heights, 90 Ill.App.3d 401, 413 N.E.2d 90 (1st Dist. 1980) 4

No. 91-1458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EVA WHEELER,

Petitioner,

VS.

BUILDING GRIEVANCE COMMITTEE
OF THE CITY OF O'FALLON, ILLINOIS,
IRVING SVENDSON, RICH GOZARD, DICK RICHARDSON,
CECIL O. LOYET, VICTOR LOGAN and CAROL LOGAN,

Respondents.

BRIEF IN OPPOSITION

ARGUMENT

I.

THE APPELLATE COURT PROPERLY DISMISSED THE APPEAL.

The Defendants-Appellees, Victor and Carol Logan, adopt the June 14, 1991 Order of the Appellate Court of the Fifth District in this case as their argument for this point.

II.

THE TRIAL COURT PROPERLY GRANTED THE MOTION TO DISMISS.

This case has previously been in the Appellate Court on the same point that is raised in this appeal. (Ex. "A" in appendix). However, O'Fallon changed its ordinances that apply to this case shortly after the Appellate Court decision. In the first case the Appellate Court ruled that the building ordinance with a six-foot set back applied over the zoning ordinance's four-foot set back because the ordinances conflicted and the Building Ordinance was passed last. This Court held that where there is an irreconcilable conflict between ordinances the latest enactment in point of time will usually control. Section 428.4 of the BOCA Building Code adopted January 7, 1980, provides that the wall of a swimming pool shall not be closer than six feet to a side lot line. The Zoning Ordinance Section 2.04(e) provided for a three foot setoff for the swimming pool (Ex. "B" in Appendix). This Court held the six feet setoff controlled.

Plaintiff's First Amended Complaint, directed against Victor and Carol Logan, in Count II seeks a permanent injunction against the Logans to relocate their swimming pool in compliance with Section 428.4 of the Building Code of the City of O'Fallon as enacted by ordinance on January 7, 1980. If Plaintiff was successful in her law suit, Defendants would have to move their swimming pool. However, the City of O'Fallon passed Ordinance 1116 on September 4, 1984 (Ex. "C" in Appendix). Ordinance 1116 adopted the "CABO ONE AND TWO FAMILY DWELLING CODE". The Cabo Code provides in R-103.1 Scope:

> "The provisions of this Code apply to the construction, prefabrication, alteration, use, occupancy, and maintenance of detached one and two family dwellings not more than three (3) stories in height and their accessory structures.

> Compliance with the requirements of this Code as amended, may be construed as prima facie evidence of compliance with the locally adopted Code."

The CABO Code is the Building Code that applies to single family residences in the City of O'Fallon and it is silent as to the setoff distance for a swimming pool. Ordinance 1116 also provides:

> "The provisions of this Code shall not be construed to repel, modify, or constitute an alternative to the provisions of the Zoning Ordinance as they relate to permitted classes of principal structures, and/or to the area and bulk regulations for buildings and structures." Section 2.04(e) is the "area and bulk regulations" provision of the O'Fallon Zoning Ordinance. Therefore, it is clear the CABO ONE AND TWO FAMILY DWELLING CODE does not control the distance from a side lot line for a swimming pool, but that the Zoning Ordinance Section 2.04(e) does.

On February 18, 1985, the City of O'Fallon adopted the BOCA Basis Natural Building code/1984 as amended by passing Ordinance 1138 (Ex. "D" in Appendix). There is a significant difference between the adoption of this building code and the one that was in force at the time of the first appeal. Section 101-5-1(c) Exemptions reads;

> "Zoning - the provisions of this code shall not be construed to repeal, modify, or constitute an alternative to the provisions of the Zoning Ordinance as they relate to permitted classes of principal buildings, to use and occupancy of building and structures, and/or to the area and bulk regulations of the building and structures."

Through the passage of Ordinance 1138, the O'Fallon City Council eliminated any conflict it had with the Zoning Ordinance in relation to "area and bulk regulations of the building and

structures". Section 2.04(e) of the Zoning Ordinance which sets the three foot side lot distance is an area and bulk regulation of the Zoning Ordinance. Therefore, the BOCA Building Code is no longer in conflict with the Zoning Ordinance and, by the express language of Ordinance 1138, the Zoning Ordinance controls. The O'Fallon City Council, by passing Ordinance 1138, eliminated the conflict that existed when the case was first in the Appellate Court and the Zoning Ordinance now controls.

It is our contention that the CABO ONE AND TWO FAMILY DWELLING CODE applies, but if the Court would decide it didn't and the BOCA Code applies, the Zoning Ordinance still controls the required setback for a lot line for a swimming pool because of the language added to Ordinance 1138 which eliminated the conflict between the Zoning Ordinance and the BOCA Code and the CABO Code.

III.

A COURT OF REVIEW MUST DECIDE PENDING CASES BASED ON LAW IN EFFECT AT THE TIME OF DECISION.

The law is clear in Illinois that a Court must decide pending cases based on the law in effect at the time of the decision. *Illinois Independent Telephone Assoc. v. Illinois Commerce Commission*, 183 Ill.App.3d 220, 539 N.E.2d 717 (4th Dist. 1989); *Sagittarius v. Village of Arlington Heights*, 90 Ill.App.3d 401, 413 N.E.2d 90 (1st Dist. 1980). As shown in the previous Argument, the City of O'Fallon changed its ordinances prior to the Plaintiffs filing their amended complaint and, therefore, the trial court was proper in following the new ordinances to grant the Motion to Dismiss. Plaintiff cites the Sagittarius case for the proposition that she has a vested right and the new law shouldn't apply. A following through of this reasoning shows she has no vested right. The Defendants built the swimming pool believing

the three feet distance from a side lot line as set forth in the Zoning Ordinance applied. Plaintiffs filed suit to contest this. This Court in the first appeal decided the six feet distance to a side lot line in the BOCA Code applied. The City of O'Fallon by Ordinances 1116 and 1138 amended their ordinances so that the Zoning Ordinances applied in this case. Plaintiff has done nothing, but file law suits. She has done nothing else, so the only thing she could have a vested right in is her law suits and the law is clear that this court has to decide the case on the law as it exists now. If the Court follows the old law, as it existed at the time of the first appeal, a ridiculous result is reached. This Court would rule that the old law applies and Defendants must move their swimming pool because it is within six feet of the side lot line in violation of the BOCA Code. The Defendants would move their swimming pool and then go to the City of O'Fallon to get a permit to put it back. The City, under its new ordinances, would tell the Defendants that they could now put it back exactly where it had been because the Zoning Ordinance now controls and it can be within three feet of a side lot line.

CONCLUSION

WHEREFORE, Victor and Carol Logan, the Defendants-Appellees pray the Court to deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Robert J. Sprague
Attorney for the
Defendants-Appellees.

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APPENDIX A

No. 5-83-0601

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

EVA WHEELER,
Plaintiff/Appellant,

vs.

CITY OF O'FALLON, ET AL,
Defendants/Appellees,

EVA WHEELER,
Plaintiff/Appellant,

vs.

BUILDING GRIEVANCE COMMITTEE
OF THE CITY OF O'FALLON, ET AL,
Defendants/Appellees.

Appeal from the Circuit Court
of St. Clair County

Honorable Stephen Kernan,
Judge Presiding.

HARRISON, J.

ORDER

Eva Wheeler, plaintiff, appeals from a judgment of the circuit court of St. Clair County affirming the decisions of the building grievance committee and the zoning board of appeals of the City of O'Fallon (city) in regard to the placement of a swimming pool on the lot of plaintiff's neighbor. For the reasons which follow, we affirm in part, reverse in part, and remand.

On December 17, 1979, the City of O'Fallon updated its zoning ordinance. This ordinance contains a chart which indicates that an "accessory building or structure", if detached and located in a "single-family residence dwelling district", must be at least three feet from the interior sideline of the builder's lot. That section of the ordinance defining "structure" specifically indicates that structures include swimming pools. Section 10.03 of the Zoning Ordinance provides that "this Ordinance shall supersede such other Ordinances or parts of other Ordinances of the City in conflict with the provisions of this Ordinance."

On January 17, 1980, the city enacted an ordinance adopting a general building code. Section 428.4 of that building code provides that "[a] wall of a swimming pool shall not be located less than six (6) feet from any rear or side property line or ten (10) feet from any street property line, except by specific rules of the jurisdiction in which it may be located." The ordinance adopting the building code also provides that "[a]ll ordinances or parts thereof that conflict with the provisions of this ordinance are to the extent of such conflict repealed."

In separate hearings before the zoning board of appeals and building grievance committees of the city, plaintiff asserted that a swimming pool installed by her neighbor, Victor Logan, was too close to her property line, and that the adequacy of the distance between Logan's pool and plaintiff's property line should be determined with reference to the building code and not the zoning ordinance. Both bodies ruled against plaintiff, the zoning board finding that the three foot setback requirement of the zoning ordinance applied and the building grievance committee denying plaintiff's claim without expressing reasons. Plaintiff subsequently sought review of both decisions in the circuit court of St. Clair County, and the cases were consolidated. Following a hearing, the court issued a judgment in which it found that the committee's finding that the relevant section of the zoning ordinance "supersedes § 428.4 of the building ordinance is * * * not against the manifest weight of the evidence."

On appeal, plaintiff argues that the trial court erred in concluding that the zoning ordinance superseded the building ordinance insofar as the setback requirement for swimming pools is concerned. We agree. The record establishes that the building ordinance did not come into effect until after the zoning ordinance had been updated. Where there is an irreconcilable conflict between statutes or ordinances the latest enactment in point of time will usually control. (See *Esin v. Liberty Mutual Insurance Co.* (1981), 99 Ill.App.3d 75, 80, 424 N.E.2d 1307; 34 Ill. L. § Prac. *Statutes* § 131 (1958).) This rule of construction is appropriately applied here, where the zoning ordinance unequivocally indicates that swimming pools must be at least three feet from the pool owner's side lot line and the building ordinance states with equal force that the minimum distance between pool and side lot lines must be six feet. Accordingly, the court erred in concluding that the relevant provisions of the zoning ordinance superseded those of the building ordinance, and the portion of the judgment so holding must be reversed.

Plaintiff also attacks the findings of the building grievance committee concerning a fence erected by plaintiff along the boundary line between her property and that of Logan. Section 428.8.2 of the building code provides that persons erecting swimming pools on their land must also "erect and maintain thereon an adequate enclosure either surrounding the property or pool area, sufficient to make such body of water inaccessible to small children." While plaintiff argues that Logan must, pursuant to this language, build his own fence along the property line in question, the building code also provides that a "natural barrier, hedge, pool cover or other protective device approved by the governing body may be used so long as the degree of protection afforded by the substituted devices or structures is not less" than that offered by the normally required enclosure. Here, the committee could properly have concluded that plaintiff's fence was the type of "other protective device" sufficient to enclose Logan's pool, and we cannot say that either the commit-

tee or the trial court erred in not requiring Logan to construct his own fence alongside plaintiff's. While plaintiff also asserts that her fence was not sufficient to make Logan's pool inaccessible to small children, we cannot say that the committee's finding to the contrary was against the manifest weight of the evidence.

For the foregoing reasons, that portion of the judgment of the circuit court of St. Clair county affirming the committee's finding regarding the adequacy of the fence is affirmed. The remainder of the judgment is reversed, and this cause is remanded for further proceedings not inconsistent herewith.

Affirmed in part, reversed in part and remanded.

WELCH, P.J., and KASSERMAN, J., concur.

APPENDIX B

Section 2.04 SCHEDULE: AREA AND BULK REGULATIONS: SIGNS; OFF-STREET PARKING REQUIREMENTS

(a) To facilitate public understanding of this Ordinance and for the better administration and convenience of use thereof, the regulations limiting the dwelling unit density, the heights, bulk and arrangement of buildings, limiting the size and use of signs, and requiring minimum off-street parking for each of the districts established by Section 2.01 hereof (or specified use), are set forth in Schedule 2.04(e) hereof, hereinafter called Schedule. Such Schedule is hereby adopted and declared to be an integral part of this Ordinance, and it may be amended in the same manner as any other part of this Ordinance.

(b) For each district (or specified use) named in said Schedule: the maximum number of dwelling units shall be as indicated in column "(B)"; the minimum lot requirements shall be as indicated in Columns "(C)", "(D)", and "(E)" of the Schedule; the minimum yard dimensions shall be as indicated in Columns "(F)", "(G)", "(H)", "(I)", and "(J)"; maximum lot coverage therefor shall be indicated as Column "(K)"; permitted floor area ratio (ratio of floor area to lot area) shall be indicated as Column "(L)"; maximum building heights shall be as indicated in Column "(M)"; requirements for accessory buildings and uses, as to maximum height shall be as indicated in columns "(O)", "(P)", "(Q)", "(R)" and "(S)", respectively; signs permitted shall be as indicated in Column "(T)"; minimum off-street parking shall be indicated in Column "(U)"; other pertinent matters and requirements are as indi-

cated in Column "(V)", and as otherwise set forth in the Schedule and in notes and remarks appended thereto.

(c) A blank space in a block of a column of said Schedule indicates that the requirement of that column does not pertain to the district or use specified on the corresponding horizontal lines. The words "Same as SR-1 (or other symbol or reference): as used in a column shall mean and include the specific limitations and requirements as set forth in the same column for district referred to by such symbol or reference; otherwise the limitations and requirements in said Schedule shall be read from left to right.

(d) Where the limitations and requirements of any of Column "(T)" through "(V)" of the Schedule are contained in a block which, reading vertically on the Schedule, covers more than one district (or specified use), such limitations and requirements shall be applicable to all of the districts or uses so covered by the block.

Where reference is made in said Schedule to another Section or provision of this Ordinance, such Section or provision referred to shall thereby be incorporated as an integral part of the requirement including such reference.

(e) SCHEDULE: AREA AND BULK REGULATIONS: SIGN AND PARKING REQUIREMENTS

See Schedule 2.04(e)

APPENDIX C

ORDINANCE NO. 1116

AN ORDINANCE AMENDING CHAPTER 7, DIVISION IV, ONE AND TWO FAMILY DWELLING CODE, OF THE CODE OF ORDINANCES, CITY OF O'FALLON, ILLINOIS AND REPEALING ORDINANCE NO. 952, AS AMENDED. **(THE CABO ONE AND TWO FAMILY DWELLING CODE)**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF O'FALLON, ILLINOIS as follows:

SECTION 1. That Chapter 7, Division IV of the Code of Ordinances, City of O'Fallon, Illinois, shall read as follows:

"7.30 **PURPOSE.** The **CABO ONE & TWO FAMILY DWELLING CODE** contains regulations designed to ensure the safe and proper construction, alteration, demolition and maintenance in accordance with nationally recognized standards. This Division is intended to adopt said regulations by reference in order to make them legally enforceable in this municipality.

"7.31 **ADOPTION OF CABO ONE & TWO FAMILY DWELLING CODE.** As authorized by State Law (Illinois Revised Statutes, Chapter 24, Section 1-3-2), the **CABO One & Two Family Dwelling Code**/1983 edition (second printing), published by the Building Officials and Code Administrators International, Incorporated, as amended from time to time, is hereby adopted as the One & Two Family Dwelling Code of the City of O'Fallon, as if fully set out in this Division, together with any insertions, additions, deletions, or modifications prescribed in Subsection (A).

(A) Revisions. The provisions of the **CABO One & Two Family Dwelling Code** are hereby revised by the insertions, additions, deletions and modifications as set forth in Schedule "D" of this Division.

SCHEDULE "D"

(1.) Delete Part V, Plumbing, Chapters 20, 21, 22, 23, 24, and 25. (Plumbing shall comply with the standards and requirements of the *Illinois State Plumbing Code, 1976.*).

(2.) Amend Part I, Chapter 1, Section R-103 to read:

"**R-103.1 Scope**. The provisions of this Code apply to the construction, prefabrication, alteration, use, occupancy and maintenance of detached one and two family dwellings not more than (3) stories in height and their accessory structures. Compliance with the requirements of this Code, as amended, may be construed as prima facie evidence of compliance with the locally adopted Code.

"**R-103.2 Exceptions**. (a) One and two family modular residence dwellings (manufactured housing) shall be subject to the operations of the *Administrative Rules and Regulations for Manufactured Housing and Mobile Home Safety Act, 1976*, as amended, Illinois Department of Public Health, Springfield, having reference to the *One and Two Family Dwelling Code of Illinois*.

"(b) One and two family mobile home dwellings shall be subject to the operations of the *Administrative Rules and Regulations for Manufactured Housing and Mobile Home Safety Act, 1976*, as amended, Illinois Department of Public Health, Springfield, having reference to the Mobile Home Construction and Safety Standards and HUD Rules and Regulations, with respect to one-family

mobile homes, and having reference to the BOCA Basic Building Code, with respect to two-family mobile homes.

"**R-103.3 Validity of Other Laws**. The provisions of this Code shall not be construed to repeal, modify or constitute an alternative to the provisions of the Zoning Ordinance as they relate to permitted classes of principal structures, to use and occupancy of buildings and structures, and/or to the area and bulk regulations for buildings and structures. Nor shall the provisions of this Code be construed to abrogate or set aside the building and structure standards and requirements of the Flood Hazard Management Regulations Ordinance, which standards and requirements therein shall be held in complement hereto. (See Section 1910.1 (b) of the National Flood Insurance Program, 41 FR 46975, Oct. 26, 1976.)"

(3.) Amend Part I, Chapter 1, Section R-107 to read:

"**R-107 Right to Appeal**. All persons shall have the right to appeal the Building Official's decision through the Building Construction Grievance Board (Chapter 7, Division III, General Building code, Code of Ordinances, O'Fallon, Illinois). Appeal procedure shall be as provided by the General Building Code."

(4.) Amend Part I, Chapter 1, Section R-109.2 to read:

"**R-109.2 Permit Fees**. Permit fees shall be as established from time to time, by Resolution of the Corporate Authorities."

(5.) Insert the following entries to Table No. R-202, Climatic and Geographic Design Criteria.

Roof Live load pounds per square foot:
"Flat to less than 4/12 pitch, 20#";
"4/12 pitch to less than 12/12 pitch, 16#";
"12/12 pitch and greater, 12#".

Roof snow load pounds per square foot: "14 4/10#"
Wind pressure in pounds per square foot: "10#"
Seismic Condition Zone: "1"
Subject to damage from weathering: "Moderate (100° to 500°)"
Frost line depth: "30 in."
Subject to damage from termites: "Moderate to heavy"
Subject to damage from decay: "Slight to moderate"

(6.) Amend Part III, Chapter 3, Figure No. R-303, the notation "1/2" Ø bolts 6' o/c, 15" in masonry not more than 12" from corner." shall read:

"1/2 inch diameter bolts 6 feet on center, 8 inches into masonry, not more than 12 inches from corner."

(7.) Amend Part III, Chapter 4, Section R-402.7, Paragraph 4 to read:

"4. At openings around vents, pipes, ducts, chimneys and fireplaces at ceilings and floor level, with noncombustible materials; fire-stopping measures need not be taken at such locations, other than fireplaces and chimneys, provided the opening has one-inch or less tolerance."

(8.) Amend Part III, Chapter 8, Section R-803.1 to read:

"**R-803.1 High Slope Application for Asphalt Roofing Shingles**. Composition shingles shall be applied only to solidly sheathed roofs. Composition shingles shall not be installed on a roof having a slope of less than four (4) in twelve (12) unless approved by the Building Officials.

Composition shingle roofs shall have an underlay of not less than fifteen (15) pound felt, applied as required for a base sheet. The underlay may be omitted where the

roof slope is four (4) inches in twelve (12) inches or greater, or where shingles are laid not less than three (3) thicknesses at any point."

(9.) Amend Part IV, Chapter II, Section M-1102 to read:

"**M-1102, Appliance Clearance**. Appliances shall have clearances from combustible material in accordance with Tables No. M-1102.1 and No. M-1102.2, or in accordance with their manufacturers listing. Furnaces and plenum chambers shall bear the label of an approved testing agency and shall have at least the minimum clearance specified by the manufacturer; the manufacturers installation instruction shall remain attached to the appliance.

(10.) Amend Part IV, Chapter 16, Section M-1603.2 Paragraph 1 to read:

"1. All duct work installed in an attic shall be insulated. All metal supply duct work installed in a ventilated crawl space or other non-conditioned area shall be insulated.* Insulation shall be a minimum two (2) inches thick, three-quarter (3/4) pound density blanket or one (1) inch thick, one and one-half ($1^1/_2$) pound density liner. When ducts used for cooling are externally insulated, the insulation shall be covered with a vapor barrier having a maximum permeance of five-hundredths (0.05) perms or aluminum foil having a minimum thickness of two (2) mils. When non-metalic ducts or other approved insulating material or lining materials are used, the minimum thermal conductance value of the material shall be twenty-three hundredths (0.23) at seventy-five degrees (75°) F. All exterior ducts insulated shall be properly protected with an approved weatherproof vapor barrier." And add the following footnote to said Section 1603.2: "*Metal supply duct work installed in a ventilated crawl space

need not be insulated if the vents are of the type "that may be closed and if the perimeter foundation walls of the crawl space are insulated with an insulation of at least R-5 value."

(11.) Amend Part III, Chapter 3, Section R-308.1, Paragraph 2 to read:

"2. All sills which rest on concrete or masonry exterior walls and are less than eight (8) inches from exposed ground; all sills and band joists or blocking wood members that are six (6) inches or less or are below earth grade."

"7.32 **ADMINISTRATION AND ENFORCEMENT**. The adopted One and Two Family Dwelling Code shall be administered and enforced in conformity with Division V, Chapter 7 of the Revised Code of Ordinances, O'Fallon, Illinois.

"7.33 **PENALTIES**. A violation of any provision of this Article shall constitute a petty offense. Any person convicted of a violation of this Article shall be fined not less than fifty dollars ($50.00), plus costs. Each day that a violation continues shall be considered a separate offense.

The imposition of the penalties herein prescribed shall not preclude the legal counsel of the City from instituting appropriate action to prevent unlawful construction or to restrain, correct or abate a violation, or to prevent illegal occupancy of a building, structure or premises or to stop an illegal act, conduct, business or use of a building, structure or premises.

"7.34 **SAVING PROVISION**. Except as provided in Schedule "D", paragraph 2, amended Section R-103.3 herein above, these regulations shall not be construed as abating any action now pending under, by virtue of, prior existing One & Two Family Dwelling Code regulations, or as discontinuing, abating, modifying, or altering any penalty accruing or about to accrue, or as

affecting the liability of any person, firm, or corporation, or as waiving any right of the City under any Section or provision existing at the time of adoption of these regulations, or as vacating or annulling any rights obtained by any person, firm or corporation, by lawful action of the City except as shall be expressly provided for in these regulations.

"7.35 **COPIES AVAILABLE FOR INSPECTION**. As required by State Law (Illinois Revised Statutes, Chapter 24, Section 1-3-2), the City Clerk is hereby directed to keep at least three (3) copies of the adopted CABO One and Two Family Dwelling Code on file in his office for public use, inspection, and examination."

SECTION 2. That Ordinance No. 952, as amended, is hereby repealed.

SECTION 3. That this Ordinance shall be in full force and effect from and after its passage, approval, and publication as provided by law.

/s/ Gary C. Mackey
MAYOR

ATTEST:
/s/ Debra Kopley
CITY CLERK
PASSED: September 4, 1984
APPROVED: September 4, 1984
PUBLISHED: September 13, 1984
AYES: Jenner, Grimmer, Holliday, Lugge, Morton, Belsheim, McGinnis, Vetri
NAYS: None

APPENDIX D

ORDINANCE NO. 1138

AN ORDINANCE AMENDING ORDINANCE NO. 742, REVISED CODE OF ORDINANCES OF THE CITY OF O'FALLON, CHAPTER 7, BUILDING REGULATIONS, ARTICLE 1, BUILDING CODE, DIVISION 3, SECTION 7.21.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF O'FALLON, ST. CLAIR COUNTY, ILLINOIS, as follows:

SECTION 1: That Chapter 7, Building Regulations, of Ordinance No. 742, Revised Code of City Ordinances, Division 3, General Building code, Section 7.21, be amended to read as follows:

1. Amend Section 7.21 to read as follows:

   "As authorized by State law (Illinois Revised Statutes, Chapter 24, Section 1-3-21), The BOCA Basic National Building code/1984 (9th edition), published by the Building Officials and Code Administrators International, Inc., as amended from time to time, is hereby adopted as the General Building Code of the city, as if fully set out in this Division, together any insertions, additions, deletions, or modifications prescribed in Subsection 7.21(A)."

2. Amend Schedule "C", Subsection 7.21(A), by deleting Paragraphs Roman numerals "I" through "XIV", and inserting in their place Paragraphs Roman numerals "I" through "XXIV", as follows:

   I. Change Section 100.1, SCOPE-Title, to read:

   "100.1 Title: These regulations shall be known as the General Building Code of the City of O'Fallon, Illinois,

hereinafter referred to as 'this code' and/or 'building code'."

II. Change Section 101.5, APPLICABILITY-Other regulations, to read:

"101.5 Other regulations: When the provisions herein specified for health, safety and welfare are more restrictive than other regulations, this code shall control; but in any case, the more rigid requirements of either the building code or other regulations shall apply whenever they may be in conflict.

"101.5.1 Exemptions:

(a) Manufactured housing - one and two-family modular residence dwellings (manufactured housing) shall be subject to the operations of the *Administrative Rules and Regulations for Manufactured Housing Mobile Home Safety Act, 1976*, as amended, Illinois Department of Public Health, Springfield, having reference to the 'One and Two-Family Dwelling Code of Illinois'.

(b) Mobile homes - One and two-family mobile homes shall be subject to the operations of the *Administrative Rules and Regulations for Manufactured Housing and Mobile Home Safety Act, 1976*, as amended, Illinois Department of Public Health, Springfield, having reference to one-family mobile home dwellings and their construction as regulated by the H.U.D. Mobile Home Construction and Safety Standards and Rules and Regulations; and having reference to two-family mobile home dwellings and to non-dwelling mobile homes and their construction as regulated by this code.

(c) Zoning - the provisions of this code shall not be construed to repeal, modify or constitute an alternative to the provisions of the zoning ordinance as they relate to permitted classes of principal buildings, to use and occupancy of buildings and structures, and/or to the area and bulk regulation of buildings and structures.

(d) Flood hazard areas - the provisions of this code shall not be construed to abrogate or set aside the building and structure standards and requirements of the Flood Hazard Management Regulations Ordinance, which standards and requirements therein shall be found in complement hereto."

III. Change Section 109.3, DEPARTMENT OF BUILDING INSPECTION-ORGANIZATION, to read:

"109.3 Organization: The Mayor shall appoint such number of officers, technical assistants, inspectors and other employees as shall be necessary for the administration of this code, with the advice and consent of the City Council."

IV. Change Section 110.1, DUTIES AND POWERS OF THE BUILDING OFFICIAL-General, to read:

"110.1 General: The administration and enforcement of this code shall be subject to the applicable provisions of Divisions III and V, Chapter 7, Article I of the Code of Ordinances of the City of O'Fallon, Illinois, and as otherwise provided herein. The building official shall enforce all the provisions of this code and shall act on any question relative to the mode or manner of construction and the materials to be used in the erection, addition to, alteration, repair, removal, demolition, installation of

service equipment and the location, use, occupancy and maintenance of all buildings and structures, except as may otherwise be specifically provided for by statutory requirements or as provided by the following Sections 110.2 through 110.8."

V. Change Section 111.2, APPLICATION FOR PERMITS - Form of Application, to read:

"112.2 Form of application: Except as otherwise provided by the provisions of Section 7.40, Division V, Article I, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois, the form and content of applications for permits shall conform to the provisions of this code. The application for a permit shall be submitted in such form as the building official may prescribe and shall be accompanied by the required fee as prescribed by Section 114.0."

VI. Change Section 114.1, FEES - General, to read:

"114.1 General: Except as otherwise provided by Subsection 7.22 (B), Division III, Article I, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois, a permit to begin work for new construction, alteration, removal, demolition or other building operations shall not be issued until the fees prescribed in this section shall have been paid to the City Clerk of the jurisdiction, nor shall an amendment to a permit necessitating an additional fee be approved until the additional fee shall have been paid."

VII. Change Section 114.3.1, FEES - Fee Schedule, to read:

"114.3.1 Fee Schedule: A fee for each plan examination, building permit and inspections shall be paid to the City Clerk at a rate, or rates, established by written order or Resolution of the Corporate Authorities."

VIII. Delete Section 114.4, FEES - Accounting, without replacement.

IX. Change Section 117.2, VIOLATIONS - Right of entry, to read:

"117.2 Right of entry: Except as otherwise provided by Section 7.37, Division V, Article I, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois, in the discharge of duties, the building official or authorized representative shall have the authority to enter at any reasonable hour any building, structure or premises in the jurisdiction to enforce the provisions of this code."

X. Change Section 117.2, VIOLATIONS - Notice of Violation, to read:

"117.2 Notice of violation: The building official shall serve a notice of violation or correction notice order on the person responsible for the erection, construction, alteration, extension, repair, removal, demolition, use or occupancy of a building or structure in violation of the provisions of this code, or in violation of a detail statement or a plan approved thereunder, or in violation of a permit or certificate issued under the provisions of this code or the order or direction made pursuant thereto. If the person responsible for such violation is not present, the notice or order may be served upon his agent or the person performing the work or occupancy, or the notice or order may be prominently posted upon the structure or premises in question."

XI. Change Section 117.3, VIOLATIONS - Prosecution for violation, to read:

"117.3 Prosecution for violation: If the notice of violation or correction notice order is not complied with promptly, the building official shall request the legal

counsel of the jurisdiction to institute the appropriate proceeding at law or in equity to restrain, correct, or abate such vioaltion or to require the removal or termination of the unlawful use of the building or structure in violation of the provisions of this code or of the order or direction made pursuant thereto. Actions for violation shall be subject to Section 7.39, Division V, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois."

XII. Change Section 117.4, VIOLATIONS - Violation penalties, to read:

"117.4 Violation penalties: Any person who shall violate a provision of this code or shall fail to comply with any of the requirements thereof or who shall erect, construct, alter or repair a building or structure in violation of an approved plan or directive of the building official, or of a permit or certificate issued under the provisions of this code, shall be subject to the operation of Section 7.23, Division III, Article I, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois."

XIII. Change Section 118.1, STOP WORK ORDER - Notice to owner, to read:

"118.1 Notice to owner: Stop work orders shall be subject to the operations of Section 7.38, Division V, Article I, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois. Upon notice from the building official that work on any building or structure is being prosecuted contrary to the provisions of this code or in an unsafe and dangerous manner, such work shall be immediately stopped. The stop work order shall be in writing and shall be given to the owner of the property involved, or the owner's agent, or to the person doing the work; and shall state the conditions under which the work may be resumed. If the owner or owner's agent cannot be found,

and if there is no one performing work at the location in question, then the stop work order shall be posted upon the structure in question."

XIV. Change Section 118.2, STOP WORK ORDER - Unlawful continuance, to read:

"118. Unlawful continuance: Any person who shall continue any work in or about the structure after having been served with a stop work order, except such work as that person is directed to perform to remove a violation or unsafe conditions, shall be liable and subject to the penalties prescribed by Section 7.23, Division III, Article I, Chapter 7 of the Code of Ordinances of the City of O'Fallon, Illinois.

XV. At Section 123.3, BOARD OF SURVEY - Compensation of board of survey, insert "(reserved)" for "(amount)".

XVI. Change Section 124.0 et seq., BOARD OF APPEALS, to read:

124.0 BUILDING CONSTRUCTION GRIEVANCE BOARD

124.1 APPLICATION FOR APPEAL: The owner of a building or structure or any other person may appeal from a decision of the building official refusing to grant a modification to the provisions of this code covering the manner of construction or materials to be used in the erection, alteration or repair of a building or structure to the Board of Appeals. Application for appeal may be made when it is claimed that: the true intent of this code or the rules legally adapted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply, or an equally good or better form of construction can be used.

124.2 CONSTRUCTION OF BOARD OF APPEALS.

124.2.1 MEMBERSHIP OF BOARD: The Board shall consist of five members recommended by the Mayor and approved by the City Council. Each member shall serve a two year term.

124.2.2 QUALIFICATIONS OF BOARD MEMBERS: Each member shall be a licensed professional engineer or architect, or a builder or superintendent of building construction, or a licensed real estate broker, with at least ten years of experience, for five years of which he shall have been in responsible charge of work. The city engineer may fill the seat of the professional engineer. Three members shall be contractors (one general contractor, one contractor-remodeling expert, one sub-contractor-electrical) and one shall be a licensed real estate broker.

124.2.3 ABSENCE OF MEMBERS: During absence of a member, the Mayor shall designate a qualified substitute. The Mayor with Council approval shall appoint alternates who may sit on the Board in the absence of any regular member. Such alternates shall meet the general qualifications as required for regular members and while sitting on the Board have the same powers and authorities of the regular member.

124.2.4 CHAIRMAN OF BOARD: The Board shall select one of its members to serve as chairman, and the City Clerk shall designate a clerk from the city to serve as recording secretary to the Board, who shall keep a detailed record of all proceedings on file in the department of building inspection.

124.2.5 EXEMPTION OF MEMBERS: A member of the Board shall not pass on any question in which he is engaged as contractor or material dealer, or in the preparation of plans or specifications, or in which he has any personal or business interest.

124.3 APPEALS PROCEDURES.

124.3.1 NOTICE OF MEETING: The Board will meet upon notice of the chairman within five days of the filing of an appeal or a stated periodic meetings if warranted by the volume of work.

124.3.2 PUBLIC MEETINGS: All meetings shall be public; and the appellant, his representative, the official of jurisdiction and any other person whose interests may be affected by the matter on appeal shall be given an opportunity to be heard.

124.3.3 ADJOURNED MEETING: When five qualified members are not present to consider a specific appeal, either the appellant, the building official or their representatives may request a postponement of the hearing.

124.4 DECISION OF BOARD OF APPEALS.

124.4.1 ACTION OF THE BOARD: The Board shall affirm, modify or reverse the decision of the building official by a concurring vote of three members. The Board in making its ruling has all the powers of the building officials from who the appeal is taken.

124.4.2 RESOLUTION OF BOARD: Every action of the Board shall be by resolution and certified copies shall be furnished to the appellant and to the building official.

124.4.3 DETERMINING THE VOTE: Failure to secure three concurring votes shall be deemed a confirmation of the decision of the building official, except that the appellant shall be entitled to further hearing before a full Board if there were not five qualified members present when the vote was taken.

124.4.4 ENFORCEMENT OF DECISION: The building official shall take immediate action in accordance with the decision of the Board.

124.5 COURT REVIEW: Any person aggrieved by a decision of the Board of Appeals may follow the Administrative Review Act to appeal the decision of the Board to the Circuit Court of St. Clair County.

XVII. Add Section 514.0 et seq., FIRE LIMITS, to read:

SECTION 514.0 FIRE LIMITS

"514.1 General: For the purpose of control of use and construction of buildings to prevent conflagration from fire, the building official may establish limiting districts designated "fire limits" and "outside fire limits", under the legal procedure of the jurisdiction for creating and establishing fire limits."

"514.2 Fire limits: The fire limits shall comprise the areas containing congested business, commercial, manufacturing and industrial uses or in which such uses are developing. The limits of such areas are described in Section 16.01, Chapter 16 of the Code of Ordinances, City of O'Fallon, Illinois."

"514.3 Outside fire limits: All other areas not included in the fire limits shall be designated as outside fire limits."

XVIII. Add Section 515.0 et seq., RESTRICTIONS WITHIN FIRE LIMITS, to read:

SECTION 515.0 RESTRICTIONS WITHIN THE FIRE LIMITS

"515.1 General: All buildings and structures, and all additions to existing buildings and structures, hereafter

erected within the boundaries of the fire limits shall be of Type 1, 2A, 2B, 3A or 3B construction as defined in Article 4 and regulated in Table 401; and shall be constructed within the height and area limitations of Table 501 except as herein provided. Open parking structures may be constructed as permitted under Section 617.0."

"515.1.1 Use not permitted: Buildings of Use Group H shall not be permitted within the fire limits."

"515.2 Type 2C, 3C or 4A construction permitted: Buildings and structures, and additions to existing buildings and structures, hereafter erected within the fire limits may be of Type 2C, 3C, or 4A construction as defined in Article 4 and regulated in Tables 401 and 501 when constructed and located in accordance with the requirements of Table 515.

TABLE 515

EXTERIOR WALL FIRE RESISTANCE RATING REQUIREMENTS

Width of fire separation adjacent to exterior wall	Fire resistance rating of exterior wall[a] or barrier	Fire resistance rating of exterior opening protectives	Minimum classification of roof covering
On lot lines or less than 3 feet therefrom or from any building	4 hour	Not permitted	B
3 feet or more but less than 6 feet	3 hour	3 hour	B
6 feet or more but less than 11 feet	2 hour	1 1/2 hour	B
11 feet or more but less than 30 feet	1 hour	3/4 hour	B
30 feet or more	0 hour	0 hour	C

NOTE a. Not less than required by Table 401. The exterior wall or barrier shall extend to the height of the building and be so constructed that it will remain structurally in place for the duration of time indicated by the required fire resistance rating. When the exterior wall or barrier is adjacent to a flat roof, it shall be constructed with a parapet (See Section 1406.4).

"515.3 Motor fuel service stations: Gasoline service stations, and structures of similar business uses, not including Use Group H, may be erected of Type 2C construction within the height and area limits for Use Group B of Table 501 provided they are located not less than 11 feet from the lot line of any building."

"515.4 Wood veneers: Wood veneers of 1 inch nominal thickness or exterior grade plywood not less than 3/8 inch thick may be used on exterior walls when facing a fire separation of a minimum of 30 feet; provided the veneer does not exceed one story in height and is applied to noncombustible backing or is furred not to exceed 1 5/8 inch and firestopped in accordance with Section 1420.0. Where all wood veneers comply with Section 1403.5.2 for exterior use, the height may be increased to two stories.

XIX. Add Section 516.0 et seq., RESTRICTIONS OUTSIDE FIRE LIMITS, to read:

"SECTION 516.0 RESTRICTIONS OUTSIDE FIRE LIMITS."

"516.1 General: Outside the fire limits all types of construction, except as herein specifically prohibited or for which special approval is required in connection with special uses and occupancies in Article 6, shall be permitted within the height and area limitations of Table 501."

"516.2 Fire separation: Exterior wall fire separation and fire resistance rated construction shall comply with the requirements of Section 1406.2.

"516.3 Roof coverings: Roof coverings shall conform to the fire resistive requirements for Class A, B, C or

nonrated roofings complying with the provisions of Section 1427.0."

XX. Add Section 623.0 et seq., MOTOR FUEL SERVICE STATIONS, to read:

"623.1 Construction: Buildings and structures used for the storage and sale of motor fuel oils shall conform to Table 501 for Use Group B and the types of construction as modified by Section 515.0."

"623.1.1 Opening protectives: All permissible openings in walls with a fire separation of less than 20 feet shall be protected with approved fire windows or doors complying with Article 14, except doors in such walls to restrooms."

"623.1.2 Basements: Motor fuel service stations shall not have cellars or basements.

"623.2 Gasoline Storage: All volatile flammable liquid storage tanks shall be installed as specified in Section 602.0."

XXI. Delete Sections 1807.1 et seq., EXCAVATIONS, and insert in their place:

"1807.1 Adoption of excavation regulations: As authorized by State Law (Illinois Revised Statutes, Chapter 24, Section 1-3-2), the provisions of the Protection of Adjacent Landowners Act of the State of Illinois (Illinois Revised Statutes, Chapter 17 1/2, Section 51), are hereby adopted as the excavation regulations of the City of O'Fallon, Illinois, as if fully set out in this code."

XXII. Change Section 1906.1, BONDS AND LIABILITY INSURANCE - FILING, by inserting the dollar amounts as listed below:

(a) Insert: "$_____.00" for: . . . . bond shall be filed in the sum of "(amount)" . . . .'

(b) Insert: "$_____.00" for: . . . . public liability in the amount of "(amount)" . . . ."

(c) Insert: "$_____.00" for: . . . . property damage in the amount of "(amount)" . . . .

XXIII. Delete Sections 2000.1 et seq., ELECTRIC WIRING, EQUIPMENT AND SYSTEMS, and insert in their place the following:

"2000.1 Electrical Code: Electrical wiring, equipment and systems shall comply with the provisions of Division II, Article I, Chapter 7 of the Code of Ordinances, City of O'Fallon, Illinois."

XXIV. Delete Sections 2200.1 et seq., PLUMBING SYSTEMS, and insert in their place the following:

"2200.1 Plumbing Code: Plumbing systems shall comply with the provisions of Division I, Article I, Chapter 7 of the Code of Ordinances, City of O'Fallon, Illinois."

3. Amend Subsection 7.22 (B), Fee Schedule, to read:

"(B) Fee Schedule. No permit to allow performance of any building work shall be issued until the applicant has paid the fee indicated in Section 114.0 of the General Building Code of the city, as amended and set forth in this Division III, Section 7.21, Schedule "C", Numbers VI and VII.

XXI. Change Section 1409.1.2, FIRE SEPARATION WALLS, Multiple single-family dwellings, and add Sections 1409.1.2.1 and 1409.1.2.2, to read:

1409.1.2 Condominium dwelling units: Dwelling units in a condominium multi-family dwelling (Use Group R-2) or in a condominium two-family dwelling (Use Group R-3) shall be completely separated from the adjoining dwelling unit(s) by fire separation walls and/or floor/ceiling assemblies having a fire resistance rating of not less than one and one-half (1 l/2) hours.

1409.1.2.1 Condominium multi-family dwelling structures (Use Group R-2) with each dwelling unit having independent means of egress shall be considered as one building classified as Use Group R-3 for determining the applicable provisions of this Code.

1409.1.2.2 Condominium multi-family dwelling structures (Use Group R-2) with dwelling units having means of egress other than independent means, unless a greater fire resistance rating is required by this code, with interior means of egress (exit access corridors, exit hallways and stairways, lobbies, etc.) shall have a fire resistance rating of at least one and one-half ($1^1/_2$) hours.

1409.1.2.3 Condominium is hereby defined as common ownership of two or more persons holding undivided fractional shares in the same property and having the right to alienate their shares, or individual ownership of a unit in a multiple unit structure.

SECTION 2: This Ordinance shall be in full force and effect from and after its passage, approval and publication.

/s/ Gary C. Mackey
MAYOR

ATTEST:
Debra Kopley
CITY CLERK
PASSED: February 18, 1985
APPROVED: February 18, 1985
PUBLISHED: FEBRUARY 28, 1985
AYES: Jenner, Grimmer, Holliday, Morton, Belsheim, McGinnis, Vetri
NAYS: NONE
ABSENT: Lugge